

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff/Respondent,

v.

CARLOS CARVAJAL-COSTA,
Defendant/Petitioner.

NO. CR-03-0188-LRS
(NO. CV-05-0044-LRS)

**ORDER DENYING MOTION TO
VACATE, CORRECT, OR SET ASIDE
SENTENCE PURSUANT TO 28 U.S.C.
§ 2255**

BEFORE THE COURT is Carlos Carvajal Costa's renewed Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed February 14, 2005 (Ct. Rec. 23). After ordering service of Defendant's motion, the government filed a response. The Court has reviewed the file and is fully informed.

I. BACKGROUND

On November 18, 2003, the Defendant pled guilty to being an Alien in the United States After Deportation in violation of 8 U.S.C. § 1326 pursuant to the parties' written plea agreement. On March 16, 2004, the Court sentenced the Defendant to seventy months imprisonment based in part upon § 2L1.2(b)(1)(A) of the U.S. Sentencing Guidelines which provided for a 16 level enhancement to the base offense level due to defendant's conviction for a drug trafficking offense for which the

1 sentence imposed exceeded 13 months. Defendant did not appeal his
2 sentence.

3 **II. DISCUSSION**

4 Defendant challenges the applicability of the 16 level federal
5 sentencing enhancement, in light of the Supreme Court's decisions in
6 *Blakely v. Washington*, 124 S.Ct. 2531(2004), *United States v.*
7 *Booker/Fanfan* 125 S.Ct. 738 (2005), and *Apprendi v. New Jersey*, U.S. 466
8 (2000).

9 The Court agrees with the government's contentions and finds that
10 Defendant's motion must be denied. In applying the 16 level enhancement,
11 the Court relied only on the "fact of prior conviction." *Booker* bars the
12 district court from considering those facts not found by the jury *other*
13 *than the fact of prior conviction*. See, e.g., *id.* at 756 (Stevens, J.)
14 ("Any fact (other than a prior conviction) which is necessary to support
15 a sentence exceeding the maximum authorized by the facts established by
16 a plea of guilty or a jury verdict must be admitted by the defendant or
17 proved to a jury beyond a reasonable doubt." (emphasis added)). The fact
18 of Defendant's prior drug conviction thus does not raise any Sixth
19 Amendment problems. See *United States v. Quintana-Quintana*, 383 F.3d
20 1052, 1053 (9th Cir.2004) (per curiam).

21 In addition, the Supreme Court's decision in *Almendarez-Torres v.*
22 *United States*, 523 U.S. 224 (1998) is controlling here. It states that
23 § 1326(b)(2) "is a penalty provision, which simply authorizes a court to
24 increase the sentence for a recidivist. It does not define a separate
25 crime. Consequently, neither the statute not the Constitution requires
26 the Government to charge the factor that it mentions, an earlier

conviction, in the indictment." *Id.* At 226-27. The holding of *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), remains good law even after *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington*, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). *United States v. Quintana-Quintana*, 383 F.3d 1052, 1052-53 (9th Cir.2004), cert. denied, 125 S.Ct. 1100, 160 L.Ed.2d 1085, 2005 WL 127012 (U.S. Jan. 24, 2005) (No. 04-7813). In addition, *United States v. Booker/Fanfan*, which applies *Blakely* to the federal Sentencing Guidelines, does not affect the holding in *Almendarez-Torres*. *Id.*

Finally, even if Defendant could show a constitutional violation, current case precedent does not support the conclusion that the remedy sought would be available on collateral review. *United States v. Sanchez-Cervantez*, 282 F.3d 664, 671 (9th Cir. 2002)(holding that *Apprendi* does not apply retroactively); *United States v. Ameline*, 400 F.3d 646 (9th Cir. 2005)(holding that *Booker* applies to all criminal cases pending on direct appeal at the time it was rendered).

III. CONCLUSION

For the reasons set forth herein, Defendant's Motion filed pursuant to 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody(Ct. Rec. 23) is **DENIED**.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order, provide a copies to the parties, and **CLOSE THE FILE**.

DATED this 29th day of April, 2005.

s/Lonny R. Suko

LONNY R. SUKO
United States District Judge